UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1642

September Term, 2014

DEBORAH ANN JOHNSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Meredith,
Leahy,

JJ.

Opinion by Meredith, J.

Filed: June 9, 2016

On July 31, 2014, Deborah Johnson, appellant, was convicted of a single count of theft in the Circuit Court for Wicomico County following a one-day jury trial. The charge arose out of a failed real estate contract negotiated by Ms. Johnson while appellant was working as the chief executive officer of the Corporation for Healthy Homes and Economic Development ("the Corporation"), a non-profit organization which had a stated purpose of helping low-income families attain home ownership. The State alleged that, while working as CEO of the Corporation, Ms. Johnson received a check for $75,000 from Desmond Jones, who understood that the Corporation would use the money to purchase an undeveloped parcel of land and build a home for him on the property. The Corporation eventually became defunct, and Mr. Jones received no refund or any other value for the $75,000 he paid to the Corporation. At trial, the State argued that Ms. Johnson failed to use the money for Mr. Jones, and instead deposited the funds into the Corporation's general operating account, from which she later caused the Corporation to disburse money to her to pay bonuses and miscellaneous personal expenses. Ms. Johnson was sentenced to 15 years' imprisonment, with all but five years suspended, and ordered to pay $75,000 in restitution. In this appeal, Ms. Johnson challenges the sufficiency of the State's evidence, as well as the jury instructions and the legality of the restitution order.

QUESTIONS PRESENTED

Ms. Johnson presented three questions for our review, which we have reordered and rephrased as follows:[1]

[1] Ms. Johnson submitted the following questions for our review:

(continued...)

1. Did the trial court err by failing to instruct the jury on the "honest belief" defense?[2]

2. Did the State present sufficient evidence to support Ms. Johnson's conviction for theft?

3. Did the trial court impose an excessive order for restitution?

Because we conclude that the trial court erred in refusing to give an instruction on the "honest belief" defense, we shall vacate the conviction. Considering the evidence from the trial in the light most favorable to the State (for the purpose of assessing whether a retrial is

[1](...continued)

1. Can the chief executive officer of a corporation be found guilty of theft under Section 7-104(a)(1) of the Criminal Law Article, when it is not contested that the alleged victim willingly paid the corporation for services to be rendered, the corporation's treasurer testified that the CEO had no authority or control over its operating account, all payments to the CEO or others were approved by the corporation, and the corporation took steps to perform?

2. Was Appellant denied due process and did the trial judge err when he refused Appellant's request that the jury be instructed pursuant to Section 7-110(b)(2) of the Criminal Law Article, that "it is a defense to the crime of theft that the defendant acted in the honest belief that the defendant had the right to obtain or exert control over the property as the defendant did," absolving the State from having to prove mens rea?

3. Did the trial judge err as a matter of law and was the sentence illegal and excessive when he imposed imprisonment, probation and restitution after attributing the entire $75,000 payment of the alleged victim to the Appellant?

[2] The "honest belief" defense is one of four statutory defenses to theft, codified in Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 7-110(c)(2), which provides: "(c) It is a defense to the crime of theft that: . . . (2) the defendant acted in the honest belief that the defendant had the right to obtain or exert control over the property as the defendant did; . . . ."

permitted), we conclude that, when so viewed, the evidence was sufficient to support a conviction for theft, and we shall remand the case for a new trial. Because there will be a new trial, we need not address appellant's argument that the amount of restitution imposed was excessive because it far exceeded the benefit personally received by the defendant.

1. The "honest belief" defense

For the purpose of analyzing whether a requested jury instruction was required, we are obligated to review the evidence in the light most favorable to the appellant. *Fleming v. State*, 373 Md. 426, 433 (2003) ("In evaluating whether competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused."). In contrast, when we review whether the State offered sufficient evidence for the case to be submitted to the jury, we must review the evidence in the light most favorable to the State. But, because the case law is clear that a defendant is entitled to an instruction on the "honest defense" belief if there is competent evidence to support it, we shall first review the evidence in the light most favorable to Ms. Johnson. *See Binnie v. State*, 321 Md. 572, 582 (1991) ("once the honest belief defense is fairly generated by the evidence, the trial court may not refuse the defendant's request to instruct the jury regarding it").

In her brief in this Court, Ms. Johnson asserts that the following facts are supported by the evidence in the record:

> Appellant, Deborah Johnson, is a forty-nine year old African American woman with no criminal record. Ms. Johnson was the chief executive officer of the Corporation for Healthy Homes and Economic Development — a 501(c)(3) corporation with the charitable purpose of building homes for low-income families.

In February 2007, Desmond Jones approached Deborah Johnson to inquire about purchasing a home from [the Corporation] in its Chaplain's Cove, Wicomico County, development.

[Mr. Jones testified that he had inherited a substantial amount of money in 2007, and began exploring the purchase of a home. He explained that his future brother-in-law (Tracy Turner)

> came to me and knew that I was trying to buy a home at the time, and he said that he knew a lady that worked for a corporation that was doing a government-funded program that was doing houses way below market price. So he introduced me to [Ms. Johnson].

They discussed the possibility of Mr. Jones purchasing a new home to be constructed in the Chaplain's Cove subdivision. He was aware that, at the time, "[i]t was a new development. Nothing had been built there or anything. It was just all land."]

Ultimately, on June 15, 2007, Desmond Jones decided to make a down-payment and secure financing on a home. He handed a check for [$]75,000 to Deborah Johnson, who handed it to Hugh Nichols to deposit it [into the checking account of the Corporation]. Mr. Jones did not execute any contract for this purchase. At trial, Mr. Jones testified that he could not remember the terms of any agreement [and no written contract was introduced into evidence].

Mr. Jones indicated that his $75,000 was a down payment on the purchase of a new home and lot and to secure financing from [the Corporation]. [The Corporation] did not require Mr. Jones to put down a specific deposit amount, but Desmond Jones chose to put down $75,000. [With respect to the amount of the deposit, Mr. Jones testified that he chose the amount, and the Corporation did not require him to put down that much money. **The [handwritten] memorandum on the check stated "House, Land, Mgt. Deposit."** (St. Exh 4, see Appx. 1). Mr. Jones received a receipt that indicated that the money was for the house and lot. (St. Exh. 6; see Appx. 2). **[When asked by the prosecutor: "What, if anything, did the Defendant tell you about the use of your $75,000?"], Mr. Jones acknowledged that he understood that the deposit "would be put towards building the home and the foundation and things of a nature [sic], stuff for the house. Materials."**

[On cross-examination, Mr. Jones acknowledged that Ms. Johnson told him that that money was to be used to develop the land. The testimony was as follows:

> Q. [BY COUNSEL FOR MS. JOHNSON] Okay. So on direct **you said that she told you that the money was going to be used to develop the land, correct?**
>
> A. [BY DESMOND JONES] **That's correct.**
>
> Q. **So it would be kind of impossible to put the money in escrow and also use it to develop the land, correct?**
>
> A. **That is correct.**
>
> Q. And again, that memo on that check line says ["]house, land, management deposit,["] correct?
>
> A. That is correct.

An expense report [of the Corporation] dated December 19, 2007, further provided Mr. Jones with a breakdown of costs. (St. Exh. 9, see Appx. 3)

Hugh Nichols, [the Corporation's] treasurer, deposited Mr. Jones's $75,000 in [the Corporation's] operating account on June 18, 2007. Mr. Nichols testified that he had sole authority over [the Corporation's] operating account, that he approved all expenditures, and that expenditures over $500 also had to be approved by [the Corporation's] board of directors. He stated that the operating account was "akin to a lockbox" as to Ms. Johnson.

In 2007 and 2008, [the Corporation] spent the money in its operating account, including the funds that came in through Desmond Jones's payment, in a variety of ways. Using [the Corporation's] bank statement, investigating officer Corporal Chester provided a list of expenditures from [the Corporation's] operating account, which included: (i) two undisputed compensation payments to Ms. Johnson totaling $10,700; (ii) multiple payments easily identified as construction costs or permitting fees relating to the Chaplain's Cove development; and (iii) other expenditures that . . . were not investigated further, but "stood out to" Corporal Chester in the course of his investigation. Both Mr. Jones and Mr. Nichols testified that, in the time after [the Corporation] deposited Mr. Jones's check, they witnessed the land

> change from unimproved earth to a developed subdivision with a road capable of supporting home construction.
>
> [The Corporation] had a process for approving payments and that process was followed when compensation payments were made to Ms. Johnson. Mr. Nichols testified that the Board approved the payments to Ms. Johnson to compensate her for her services as executive director of [the Corporation]. He explained that [the Corporation] was supposed to provide Ms. Johnson a salary of $5,000 per month for her full-time work as executive director, but she had not been paid for some months. As a result, Mr. Nichols testified that the Board chose to compensate Ms. Johnson in the form of a bonus or commission when funds became available. Mr. Nichols remarked that [the Corporation] had been funded on other occasions through the award of grants.
>
> In 2008, [the Corporation] experienced financial difficulty when the [real estate] market crashed, and in 2009, [the Corporation became] defunct. Farmers Bank of Willards, [the Corporation's] secured lender, ultimately obtained the Chaplain's Cove land by deed in lieu of foreclosure. [The Corporation] did not return any portion of Mr. Jones's down-payment.

(Emphasis added; citations to transcript omitted.)

When Ms. Johnson testified at trial, she was asked: "Did you intend to sell a house to Desmond Jones?" She answered: "Yes." When asked "what prevented the sale of the house," she replied: "The market collapse."

Appellant emphasizes that the Corporation made extensive efforts to develop the subdivision in preparation for being able to build houses for Mr. Jones and others. Appellant contends that, from the evidence of these activities, the jury could infer that the "actions demonstrate an intent to perform [the agreement with Mr. Jones]." Appellant asserts:

> After lawfully receiving Mr. Jones's money, [the Corporation], with Ms. Johnson's assistance, among other things[:] (1) acquired financing from the Farmer's Bank of Willards formally to purchase the land that would become the Chaplin's Cove development where Mr. Jones's home was to be built; (2) executed a maintenance and inspection agreement for private

> stormwater management facilities on the property; (3) filed with the State Department of Assessments and Taxation to incorporate the Chaplin's Cove Homeowner's Association; (4) deeded a roadway through the development to Wicomico County; (5) developed a Declaration of Covenants, Conditions, Easements, & Restrictions for the Chaplin's Cove subdivision; (6) filed the Chaplin's Cove Final Subdivision Plat with Wicomico County Land Records; (7) created a homeowners association; and (8) hired Parker & Associates to improve the land. The lot went from undeveloped land to land fully prepared for home construction with an access road. Indeed, homes were constructed on the land after [the Corporation] became insolvent.

Mr. Jones acknowledged that his brother-in-law who had initially put him in contact with Ms. Johnson and the Corporation eventually succeeded in acquiring Lot 8 in Chaplain's Cove, and now lives in a home that was constructed on Lot 8 after the Corporation became insolvent. That lot was "deeded" to the brother-in-law by Ms. Johnson in 2010.

We agree with the appellant's assertion that, if the jury viewed all of the above evidence, and all inferences from the evidence, in the light most favorable to Ms. Johnson, a reasoning jury could rationally conclude that, at the time Ms. Johnson took Mr. Jones's deposit check, she did not intend to deprive him of that property, and thereafter, did not knowingly use the property in a manner that would probably deprive him of the property. There was sufficient evidence of a good faith business purpose on the part of Ms. Johnson and the Corporation to support an instruction regarding the "honest belief" defense codified in CL § 7-110(c)(2), which provides: "(c) It is a defense to the crime of theft that: . . . (2) the defendant acted in the honest belief that the defendant had the right to obtain or exert control over the property as the defendant did; . . . ."

At the close of evidence, Ms. Johnson made a request for the court to give the jury an instruction on the "honest belief defense." The trial court observed, correctly, that there is

no pattern instruction on point in the MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS (2d ed. 2013). But the Comment to MPJI-Cr 4:32 — the instruction applicable to Theft - Unauthorized Control, CL § 7-104(a) — observes that "[CL] Section 7-110(c) provides a defense to theft if . . . the defendant acted in the honest belief of the right to obtain or exert control, ..." The Comment further notes:

> In *Sibert v. State*, 301 Md. 141, 482 A.2d 483 (1984), the Court of Appeals analyzed both the good faith claim of right defense and the honest belief defense. . . . [*S*]*ee Allen v. State*, 157 Md. App. 177, 184-87, 850 A.2d 365, 369-70 (2004) (holding that, **if evidence generates the "honest belief" defense and the defendant requests such an instruction, the court is obligated to give it**).

Id. at 836 (emphasis added).

Prior to instructing the jury, the trial court announced that there would not be an instruction given relative to the honest belief defense. The judge explained: "I don't think I'm going to give that instruction. I don't think it applies to the facts of this case. I don't think it's been generated." Appellant's counsel took exception, both before and after the jury was instructed, to the court's refusal to instruct on the honest belief defense. We agree with appellant that the court should have given an instruction on the defense, and the refusal to do so was reversible error.

As the Comment to MPJI-Cr 4:32 points out, the Court of Appeals analyzed the honest belief defense to a charge of theft in *Sibert v. State*, 301 Md. 141 (1984). In that case, Sibert had been charged with the theft of two doors that had been installed in a building owned by Sibert at some point after the doors had been stolen from a construction site. Sibert claimed that he had purchased the doors and did not know that they were stolen property. At

the close of evidence, defense counsel asked that the jury be instructed "as to the statutory defenses to the crime of theft codified at § 343(c) of [Maryland Code (1957),] Art. 27." *Id*. at 144. The Court of Appeals noted that "Sibert's counsel failed to specify the defenses within § 343(c) that were applicable," *id*., but the Court inferred that subsections (c)(1) and (c)(2) were the only two candidates. At that time, the wording of Art. 27, § 343(c)(2) was virtually the same as CL § 7-110(c)(2), except that the masculine pronoun "he" has now been replaced with the gender-neutral noun "the defendant."

Reviewing the legislative history of the statutory defenses to theft, the *Sibert* Court observed that the "General Assembly's enactment in 1978 of the theft offense statutes resulted in the consolidation of various larceny related offenses into a single offense designated as theft. Chapter 849 of the 1978 Acts (codified at §§ 340–344 of Art. 27)." 301 Md. at 145. The Court added: "In addition to consolidating various larceny-related offenses into a single offense designated as theft, as noted above, the General Assembly fashioned four separate statutory defenses to the offense of theft," including "the 'honest belief' defense under [Article 27,] § 343(c)(2)." *Id*. at 146. The *Sibert* Court provided the following description of the honest belief defense:

> The honest belief defense in § 343(c)(2) provides in essence that a person is not guilty of theft if he "acted in the honest belief that he had the right to obtain or exert control over the property as he did." Neither the theft statute nor the accompanying legislative history defines the phrase "honest belief." Nevertheless, it is clear that **this defense operates to negate the mens rea for the offense of theft, thereby providing a total defense**.

Id. at 148-49 (emphasis added).

In its discussion of whether the instruction was generated by the evidence, the Court in *Sibert* summarized the defendant's testimony in which he explained that he had purchased the doors from a stranger, known only as "Bill," who approached him on the street and offered to sell some doors at a substantial discount from their normal price. *Id*. at 150-51. Sibert did not ask for or receive a receipt, but did say to Bill, "I don't want to buy nothing hot." He was satisfied by Bill's response that "the doors are not hot." *Id*. at 149-50. Sibert installed the exterior doors in plain view of the public at his building. And, at some point, Sibert called the Hagerstown police to report a break-in at the building where he had installed the doors. The Court of Appeals concluded that the evidence was sufficient to require that the trial court provide an instruction on the honest belief defense. It explained:

> On the basis of these facts, a jury could conclude that Sibert manifested a honest belief that he had a right to exert control over the doors as he did by virtue of his making no attempt to secret the doors from the inquisitive eyes of investigating police.
>
> In our view, the above makes clear that Sibert produced evidence sufficient to generate a jury issue as to the honest belief defense under § 343(c)(2). Whether a jury sitting as the trier of fact would give any weight to this evidence or would lend any credence to Sibert and his witnesses is for the jury's determination, not that of the trial judge. The contradictions between the testimony elicited from the State's witnesses and that of the defense's witnesses go only to the weight of the evidence, not to its sufficiency. *Jackson v. State*, 52 Md. App. 327, 335, 449 A.2d 438 (1982). Simply put, the jury is free to discount or disregard totally Sibert's account of the transaction. But once he generates the issue, the trial court cannot withhold a relevant issue such as this from the jury's consideration in the first instance. **It is within the jury's province, not that of the courts, to determine whether Sibert should benefit from the honest belief defense in this factual situation, regardless of how dubious or incredible Sibert's account may appear to the trial court.**

Id. at 151-52 (emphasis added).

Rejecting this Court's conclusion that the essence of the honest belief defense had been adequately covered by the trial court's other theft instructions that included references to acting knowingly, the *Sibert* Court held that a separate instruction on the statutory defense is mandatory when requested:

> The trial court instructed the jury that, under § 342(c), a person commits theft "if he possesses stolen property knowing that it has been stolen, or believing that it has probably been stolen ...." In light of this instruction, the intermediate appellate court reasoned that had the jury accepted Sibert's version of the transaction, it would have concluded that he did not know the doors had been stolen, and he would have been acquitted. As a consequence, Sibert's requested instruction would have added no information that was not already provided in the instruction given because the court's instruction fairly covered every essential question of law raised by the evidence. Although this reasoning is appealing, it does violence to the legislature's intent in enacting the theft-related defenses in general and the honest belief defense in particular. What the intermediate appellate court's analysis fails to recognize is that **the honest belief defense is mandated by the legislature when the defendant generates the issue and requests that the jury be so instructed**.

Id. at 152-53 (emphasis added).

The Court of Appeals reiterated in *Sibert*, *id*. at 154: "[W]hen the legislature explicitly enumerated four defenses to the crime of theft, it intended a defendant to be entitled to a jury instruction on any defense generated by the evidence." The case was remanded for a new trial.

The Court of Appeals came to a similar conclusion in *Binnie v. State*, 321 Md. 572 (1991). In that case, Mr. Leslie Binnie was convicted of shoplifting a hat from a J.C. Penney store. According to a security officer for the store, Binnie "took a black hat from the rack [on which hats were displayed] and hid it inside his jacket 'under his left arm pit.'" *Id*. at 574. Binnie then wandered through the store, passing by several cash registers, and he eventually

left the store. He was then confronted by the store's security employees, who claimed that he admitted to the theft. But Binnie testified to a very different version of the facts. He said he found the hat on the floor, underneath a rack containing shirts and jackets but no hats. The hat was dirty and he could not find a price tag (although a photograph of the hat admitted in evidence showed that a price tag about three inches long was attached to the hat when Binnie exited the store). Binnie claimed that he asked a sales clerk (whose name he did not know) if the hat he found was merchandise of the store, and the clerk responded that she did not know, and directed him to check another area of the store. After he located a rack of hats, he concluded that there were no other hats like the one he had found on the floor. He went back and reported this to the sales clerk, who said, jokingly, "Well I guess it's yours." He then walked out of the store with the hat in his pocket, and was soon stopped by two men from the store. He said that he denied stealing the hat. The trial judge refused to instruct the jury regarding the "honest belief" defense (then codified in Article 27, § 343(c)(2)).

The Court of Appeals concluded that the instruction was generated by the evidence, explaining:

> In our view, Binnie's testimony was sufficient to support fairly the issue whether he acted in an honest belief within the contemplation of Art. 27, § 343(c)(2). Whether the jury sitting as a trier of fact would lend any credence to Binnie or give any weight to his testimony was for the jury's determination, not that of the trial judge. The contradictions between Binnie's evidence and that of Tosadori [, the store security officer,] went only to the weight of the evidence, not to its sufficiency. *Sibert*, 301 Md. at 152, 482 A.2d 483. . . . Simply put, the jury was free to discount or disregard totally Binnie's account of the incident and believe Tosadori's version. It was equally free, however, to discount or totally disregard Tosadori's account and believe Binnie's version. **If the jury believed Binnie, the honest belief defense was generated by his testimony and operated as a total defense to the charge.**

> We observe that such an issue may be generated by the testimony of the defendant alone; it is not necessary that his testimony be corroborated. . . .
>
> . . . In short, under the circumstances and the factual situation presented by Binnie, it was within the province of the jury, not of the court, to determine whether Binnie should benefit from the honest belief defense, regardless of how dubious, suspect, farfetched, and incredible Binnie's account may have appeared to the trial judge.

321 Md. at 580-81.

As the Court had held in *Sibert*, the Court again stated in *Binnie*, *id*. at 582: "[O]nce the honest belief defense is fairly generated by the evidence, the trial court may not refuse the defendant's request to instruct the jury regarding it." Accordingly, the Court held that the trial court's "failure to give an instruction on the honest belief defense" was reversible error, and therefore, "Binnie is entitled to a new trial." *Id*. at 583.

This Court also came to a similar conclusion in *Allen v. State*, 157 Md. App. 177 (2004). In that case, a police officer observed the defendant (Allen) driving a car that had been reported stolen a week earlier. Allen was arrested, and he was eventually convicted of theft of property valued over $500. At trial, evidence of the following facts was elicited from the arresting officer, who testified for the State:

> When [Allen] was arrested, the keys were in the car and the ignition was undamaged. Allen told the officers that "he rented a car for $10.00 from an individual in the 600 block of Pitcher." He told them that he did not know the name or address of the person from whom he rented the car, and that he did not have a written rental agreement for the car.

Id. at 181.

Allen did not testify. At the close of evidence, defense counsel "asked the trial court to give an instruction on the honest belief defense." *Id*. The trial court refused to do so. On

appeal, Allen argued that the arresting officer's "testimony that Allen said he had rented the car from another individual generated an 'honest [belief] defense' instruction." *Id*. at 182-83. The State argued that "other instructions sufficiently covered the defense." *Id*. at 183.

After pointing out that, under Maryland Rule 4-325(c), "[w]hen requested to do so by a party, the trial court is required to give an instruction that correctly states the applicable law if it has not been fairly covered in the instructions actually given," we observed: "The instruction must be given if there is 'some evidence' giving rise to a jury issue on the defense. *See Dykes v. State*, 319 Md. 206, 216, 571 A.2d 1251 (1990)." 157 Md. App. at 184. We concluded "that the evidence here generated an 'honest belief' issue." *Id*. If the evidence is considered in a light favorable to the defendant, then "[o]ne inference that a reasonable juror might draw from this evidence is that Allen believed the car was not stolen." *Id*.

We rejected the State's argument that the issue of whether the defendant had an honest belief had already been adequately covered by the pattern instructions on theft. We stated, *id*. at 185:

> The *Sibert* Court was clear, however, that if the evidence generates an honest belief issue, this pattern instruction is inadequate:
>
> > For us to conclude that jury instructions encompassing the elements of theft by possession fairly cover the honest belief defense when generated by the evidence would be for us to ignore the legislative intent in enacting § 343(c)(2) and render the language of this section surplusage and a nullity. In effect, this could create a *per se* rule that jury instructions are never required for a § 343(c)(2) defense in a § 342(c) theft by possession case. We do not believe the legislature intended such an anomalous result.
>
> [*Sibert, supra*, 301 Md. at 154.]

We reach a similar conclusion in this case. If all evidence is viewed in the light most favorable to the defendant, there was evidence that supports an inference that Ms. Johnson had an honest belief that she had the right to "obtain or exert control of the property" as she did. Consequently, the trial court erred in refusing to give an instruction of the defense set forth in CL § 7-110(c)(2), and we will remand the case for a new trial.

2. Sufficiency of evidence for a retrial.

If, as Ms. Johnson contends, there was insufficient evidence presented at the first trial to support her conviction, retrial would be barred by double jeopardy principles. *Burks v. United States*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.") (footnote omitted). But, when we review the sufficiency of the evidence for this purpose, we are obligated to consider all facts and all inferences in the light most favorable to the State. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We conclude that, when viewed in a light most favorable to the State, the evidence was sufficient to establish a *prima facie* case of theft under CL§ 7-104(a).[3]

The trial court instructed the jury that "[t]he sole charge in this case theft." The court then explained:

> Theft can take various forms. It can mean taking and carrying away property. It can mean possession of stolen property. That's not the kind of theft the State

[3] In the course of discussing proposed jury instructions after the close of evidence, the trial court asked the prosecutor: "Which part of the theft instruction should I read?" The prosecutor responded: "Your Honor, I am proceeding under the theory of unauthorized control." That variety of theft is defined by CL § 7-104(a).

> is attempting to prove in this case. They are attempting to prove unauthorized control.
>
> In order to convict the Defendant of theft, the State must prove, first, that the Defendant willfully or knowingly obtained or exerted unauthorized control over the property of, I believe his name is Desmond Jones. Two, that the Defendant had the purpose of depriving Desmond Jones of that property. And, three, that the value of the property was over $500. So those are the three things the State has to prove.
>
> I'll repeat them. That the Defendant, Deborah Johnson, willfully or knowingly obtained or exerted unauthorized control over the property, in this case I guess it's the money [of Desmond Jones].
>
> * * *
>
> Number two, that she did so with the purpose of depriving Desmond Jones of that money, or the use of that money. And, three, that the value of the money was over $500.
>
> To deprive means to withhold something from somebody, either permanently or for a period of time so as to appropriate an apportion [sic] of its value.

Ms. Johnson contends that the State's case necessarily fails because Mr. Jones clearly gave her the check willingly, and, because it was made payable to the Corporation, she turned the check over to the Corporation's treasurer, who deposited the check into the Corporation's checking account that was under the treasurer's control. Thereafter, all disbursements were made by the Corporation, and, although a small percentage of the funds were paid to Ms. Johnson as compensation for her efforts as CEO of the Corporation, the balance of the funds were used by the Corporation for business purposes and pursuing development of the building lots in the subdivision where Mr. Jones wanted to purchase a home. Furthermore, CL § 7-104(f) stipulates: "Under this section, an offender's intention or knowledge that a

promise would not be performed may not be established by or inferred solely from the fact that the promise was not performed."

But the State argued to the jury:

> [A] person may not willfully or knowingly obtain or exert unauthorized control . . . over . . . someone else's property.
>
> . . . [Y]ou have to decide whether [Deborah Johnson] . . . , you can pick here, whether she knew that exerting control over Desmond Jones's $75,000, if it became unauthorized [sic].
>
> So initially on June 15, 2007, when they shook hands and he handed her the check. It may have been authorized at that point in time, but it became unauthorized once Deborah Johnson started writing checks that came out of Desmond Jones's money.
>
> * * *
>
> . . . This is what the evidence shows that the Defendant knew. The Defendant knew that on June 15, 2007, Desmond Jones handed her a check for $75,000. And that check was for a plot of land and a down payment on a home.
>
> The Defendant also knew that her corporation was struggling financially prior to June 15, 2007. . . . I want you all to look at . . . the account statements from M&T [Bank], their only account, where they only had $77.72. And then we have this huge increase of funds. And all of that money came from Desmond Jones. And then like a ski slope, it just drops off. Because all those past due bills that had been coming in and the telephone calls were still coming in, but now they could satisfy that money [sic], or satisfy those bills with Desmond Jones's money.
>
> . . . The Defendant knew what that check was for. The Defendant knew that the $75,000 was for the lot and for purchasing or construction on the home.
>
> The Defendant knew, and a reasonable person would know, that writing checks where you have basically no money and then writing a multitude of checks that deplete, or that come out of that $75,000, she knew that Desmond Jones wasn't going to get his property or be able to build a home. And by

> September 10th, and you'll be able to look at the records, Desmond Jones's $75,000 was gone.
>
> . . . [I]f you believe that the Defendant knew that her use of the money, which did not have anything to do with Desmond Jones's lot, and she knew that that money was used and she deprived him of $500.01, the Defendant is guilty of theft over $500.

The prosecutor also drew the jury's attention to a number of checks totaling approximately $15,000 that the Corporation had written to, or for the personal benefit of, Ms. Johnson.

On appeal, Ms. Johnson continues to argue that her case is indistinguishable from *State v. Coleman*, 423 Md. 666 (2011), a case in which the Court of Appeals found insufficient evidence to support the theft conviction of a builder. Coleman was a builder of residential homes. In early 2004, his corporation entered into eight contracts to sell lots with homes to be constructed on them. The transactions were described by the Court of Appeals as follows:

> In February and March of 2004, Coleman entered into contracts to convey eight lots in a subdivision and build homes on those lots. The subdivision was called Kings Grant Court, a collection of eleven lots in Prince George's County. Earlier that year, Coleman had acquired the right to purchase Kings Grant Court for $550,000. [Coleman performed these transactions through a corporation called Opportunity Investment Group.]
>
> The contracts provided that the buyers would purchase the unimproved lots before their homes were constructed. Seven of the eight contracts identified the price of the unimproved lots, which ranged from $89,959 to $100,000. For at least seven of the eight lots, this price was at or below the appraised value of the land at the times the contracts were executed. The total price under the contracts ranged from $256,000 to $360,891, inclusive of constructing the homes.

> The buyers paid for the unimproved lots by obtaining loans with an initial advance for the purchase of the land. At closing, Coleman used the initial advances to purchase one lot for each buyer and convey title by deeds to them. He received $667,993.19 from the advances and used $500,000 of it to buy the lots.
>
> The remaining balance on the buyers' loans was held in escrow by the lenders pursuant to a draw schedule under which Coleman would make draws to cover his ongoing construction costs. To make draws, Coleman would have needed to certify that materials were received or work was done, that payment was due, and that the Bank had inspected and approved the work or materials. Coleman never applied for any construction draws, however, because construction never went forward. The only payments that Coleman received from the buyers were the initial land advances, used to purchase the lots, and amounts ranging from $900 to $3500 for paper work costs such as blueprints and site plans.
>
> Construction never went forward because Coleman ran out of money before he was able to obtain the required permits. He had hired MDB Design Group LLC on June 30, 2004, to prepare drawings and designs and obtain the permits. His contract with MDB provided that its work would be completed by August 31, 2004. He also consulted a builder about the project and retained two individuals to process permits and provide real estate consulting. When MDB failed to obtain the permits by the deadline, Coleman contacted James Reid, CEO of Civtech Designs, Inc., to discuss replacing MDB.
>
> Coleman extended MDB's deadline to November 10, 2004, but MDB again failed to meet it, so he retained Civtech on November 12, 2004, to do the work that MDB was supposed to have done. He notified the buyers of this change on December 3, 2004, stating that he would still be able to complete the project. By the end of December, however, Coleman's operating account had a negative balance and he began to ignore inquiries from the buyers. Ultimately, the buyers either filed for bankruptcy, had their lots foreclosed, or refinanced or modified their loans.

423 Md. at 670-672 (footnotes omitted).

The Court of Appeals focused on the evidence of Coleman's intent (or lack of intent) to deprive the buyers of their property, and observed: "The requirement of intentional deprivation makes theft a specific intent crime." *Id*. at 673. And the Court pointed out:

"Intent may be inferred from acts occurring subsequent to the commission of the alleged crime." *Id*. at 674.

The *Coleman* Court described the theory of prosecution as follows: "The State argues that Coleman's intent to deprive was proved by the fact that he [through the corporation he controlled] entered into the contracts, and took the initial advances, with no intent to perform them fully." *Id*. at 674-75. The evidence the State relied upon to support its claim that Coleman had an intent to deprive included the fact that he received funds at the closings and did not "put monies he received from advances toward development of the property," as well as his lack of diligence in pursuing the development, and his evasive responses to impatient buyers. *Id.* at 675. But the Court of Appeals disagreed that this evidence was sufficient to support an finding of intent to deprive, and stated: "When a defendant has a right to receive money or property, he cannot be guilty of stealing it." *Id*. The Court continued: "Indeed, as we observed in *Sibert v. State*, even an honest belief in the right to receive money or property negates the mens rea element of theft . . . ." *Id.* at 676. And, the Court declared that "making a profit on a land transaction is not theft." *Id*. at 677. In Coleman's case, the Court of Appeals concluded: "There is no evidence that Coleman lacked either a right to the money he received or 'an honest belief' in that right." *Id*. at 676.

Although these comments of the *Coleman* Court seem to support Ms. Johnson's claim of innocent intent, the Court of Appeals also emphasized some other facts that were present in Coleman's case but are not present in Ms. Johnson's case. One major consideration for the *Coleman* Court seemed to be the fact that Coleman's buyers all received title to the lots. The

Court commented: "The evidence at trial shows that he gave value, i.e. conveyed the lots, for the money he received in the way of advances to pay for the lots, as provided under the contracts. *In exchange for the initial draws and miscellaneous payments, the buyers received land and also construction blueprints*. Coleman received no further payments or draws." *Id*. at 676-77 (emphasis added). The Court added: "Importantly, there is no evidence that he received more than market value for the land he conveyed. Indeed, for at least seven of the eight lots, the price he charged was at or below the appraised value of the land." *Id*. at 677. Further, the *Coleman* Court pointed out: "There is no evidence, however, that Coleman used the money for anything but the Kings Grant Court project. With these facts, no rational jury could conclude that Coleman intentionally deprived the buyers of their money by overcharging for their lots and keeping the excess money with no intent to perform the rest of the contracts." *Id*.

The *Coleman* Court made a point of distinguishing the facts of *Lane v. State*, 60 Md. App. 412 (1984), a case in which this Court affirmed a conviction for theft. The Court of Appeals observed in *Coleman*, 423 Md. at 679 n.7:

> [I]n *Lane* there was evidence that the defendant used the money he received for his own purposes. *See Lane v. State*, 60 Md. App. 412, 423, 483 A.2d 369, 375 (1984) ("Appellant appropriated a portion of the value when the money was used, at least partially, to fund his commissions and bonus."). Again, **there is no evidence that Coleman kept the money or used it improperly**.

(Emphasis added.)

In contrast to these points that were emphasized regarding the lack of legally sufficient evidence in Coleman's case, the evidence in Ms. Johnson's case reflected that Mr. Jones

never received any land or blueprints for his $75,000. There was evidence from which the jury could have concluded that some portion of the funds provided by Mr. Jones were used to benefit Ms. Johnson personally, with some of the disbursements being made to her almost immediately after he handed over the check. There was evidence from which the jury could have concluded that Ms. Johnson knew that any funds received from Mr. Jones would be placed in the Corporation's operating account without any restriction on use. And the evidence showing that the Corporation's liquid funds were a mere $77.72 at the time Ms. Johnson received Mr. Jones's check raises a factual question as to whether she exerted control over his funds knowing that the Corporation's use of the money "probably will deprive [Mr. Jones] of the property." CL §7-104(a)(3). In our view, these factual differences between Coleman's case and Ms. Johnson's case are sufficient to raise a jury question regarding Ms. Johnson's intent (or lack of intent) to deprive Mr. Jones of his property.

Upholding theft convictions of an unlicensed builder in *State v. Manion*, 442 Md. 419 (2015), the Court of Appeals highlighted some of the facts that led to a finding of evidentiary sufficiency in *Manion* whereas the Court had found insufficiency in *Coleman*. The *Manion* Court stated:

> Manion contends that the State's position in the present case is inconsistent with our decision in *Coleman*. We disagree that the instant case contradicts the result reached in *Coleman* and note that the evidence adduced at trial regarding Manion's intent far exceeded his non-performance. Although both Manion and Coleman failed to complete construction contracts, the similarity between the two ends there. Whereas Coleman provided buyers with title to land in exchange for an initial payment and requested no additional money for construction, Manion provided no services or materials in exchange for money he received. Moreover, Coleman's conduct subsequent to entering

into the contracts lies in stark contrast to that of Manion's. Coleman performed significant work in preparation for the construction project, including:

> [W]ork[ing] with several companies to draft architectural drawings and floor plans; retain[ing] MDB to obtain permits and perform architectural and engineering services; hir[ing] two individuals to process permits; consult[ing] a builder about the project; consult[ing] with the CEO of Civtech about replacing MDB; and eventually replac[ing] MDB with Civtech after MDB missed its self-imposed deadlines.

Coleman, 423 Md. at 677–78, 33 A.3d at 474. With respect to the projects Manion failed to perform, however, there was no evidence of any similar efforts.

Id. at 440-41.

The *Manion* Court concluded:

> From the circumstantial evidence presented regarding Manion's intent, a rational trier of fact could conclude, beyond a reasonable doubt, that Manion intended to deprive each homeowner of their money. This conclusion could be drawn without the need to resort to conjecture or speculation.

Id. at 437. *See also Wagner v. State*, 445 Md. 404, 420 (2015) (evidence was sufficient to sustain conviction of theft under CL § 7-104(a) where daughter was signatory on father's bank account and withdrew funds to be used for her own benefit); *Breakfield v. State*, 195 Md. App. 377, 393-94 (2010) (evidence was sufficient to sustain conviction of theft under CL § 7-104(a) where an operator of a nursing home facility took control of a patient's funds, deposited the money into the nursing home's bank account, and then withdrew funds to cover excessive fees).

In our view, Ms. Johnson's case lies somewhere between Coleman's and Manion's. Whether the facts and circumstances are close enough to those in *Coleman* to persuade a jury

that she had no intent to deprive Mr. Jones of his money is, we conclude, a question of fact and not a question that we can conclusively resolve as a matter of law. We will remand the case for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WICOMICO COUNTY.